

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KELLY JACKSON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,054,554
<b>U.S.D. 501</b>	)	
Self-Insured Respondent	)	

**ORDER**

Respondent requests review of the November 17, 2011 Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

**ISSUES**

The Administrative Law Judge (ALJ) ordered medical treatment for the claimant with Dr. Ketchum until further order to be paid by respondent and its insurance carrier. The ALJ went on to order the doctor to determine what if any additional treatment is necessary to effect a cure and/or relief of the effects of claimant's injury. The doctor was instructed to refer claimant to an appropriate provider for pain management, physical therapy or similar measures.

The respondent requests review of whether the ALJ exceeded his jurisdiction by finding that claimant suffered an accidental injury arising out of and in the course of her employment, and whether claimant is entitled to medical treatment with Dr. Ketchum and at his referral. Respondent contends that according to *Ort*<sup>1</sup>, the claimant can't recover compensation as she testified her problems started back in 1993 and 1994 and that she didn't want carpal tunnel surgery.

Claimant argues that the Board should dismiss respondent's appeal as it applies to the ALJ's preliminary hearing Order dated August 15, 2011, and therefore respondent's application for review is not timely. Claimant also contends that this appeal should be dismissed as the Board lacks jurisdiction to review the request for medical treatment from a preliminary hearing, which is what the ALJ's November 17, 2011 Order pertains to and

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<sup>1</sup> *Ort v. Allied Industries, Inc.*, 166 Kan. 487, 203 P.2d 234 (1949).

is what the respondent has appealed. In the event the Board finds there is jurisdiction, claimant contends that the order should be affirmed. The parties stipulated at the preliminary hearing on August 12, 2011, that claimant's date of accident in this matter is February 17, 2011, the date that claimant provided written notice of the accident to respondent.

### **FINDINGS OF FACT**

After reviewing the record compiled to date, the undersigned Board Member concludes.

This matter went to preliminary hearing on August 12, 2011, after claimant filed her K-WC E-3 Application For Preliminary Hearing on May 25, 2011. At the preliminary hearing, respondent denied that claimant suffered personal injury by accident which arose out of and in the course of her employment, denied timely notice and timely written claim and objected to any medical treatment for claimant.

The ALJ then issued two Orders, both dated August 15, 2011. The first Order found that claimant had suffered personal injury by accident which arose out of and in the course of her employment and that claimant had provided both timely notice and timely written claim. The second Order referred claimant to Dr. Lynn Ketchum, to determine what, if any, medical care is necessary to cure and relieve claimant's carpal tunnel syndrome. The Order also requested that the doctor render an opinion regarding whether claimant's work duties for the employer caused, aggravated or accelerated claimant's need for treatment. The Order does not request an opinion regarding whether claimants work caused the condition, only if it effected the need for treatment. No appeal was taken from those Orders.

Claimant was examined by Dr. Ketchum on September 29, 2011. The doctor determined that claimant had bilateral carpal tunnel syndrome. He found claimant's bilateral upper extremity carpal tunnel syndrome was related to her work with respondent. He recommended that claimant pursue surgery, bilaterally, or risk the loss of function in terms of fine motor skills in her hands. He also rated claimant's bilateral carpal tunnel syndrome, as he had been earlier advised that claimant was reluctant to pursue the recommended surgeries.

After receipt of Dr. Ketchum's September 29, 2011 report, the ALJ then issued an Order For Medical Treatment on November 17, 2011, with Dr. Ketchum as the authorized treating physician. That Order does not address the issues of causation, notice or written claim which were discussed and decided in the August 15, 2011 Order. Respondent appealed the November 17, 2011 Order, contesting whether claimant's alleged accidental injury arose out of and in the course of her employment, and claimant's entitlement to medical treatment with Dr. Ketchum.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-551(i)(1) states:

(i) (1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. **All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.** Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties. (Emphasis Added)

Claimant contends that respondent's appeal in this matter is untimely and should be dismissed. The original Order of the ALJ which determined that claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent, was issued on August 15, 2011. No appeal was taken from that Order. Any appeal filed from that Order at this time would be untimely.

However, the ALJ then referred claimant to Dr. Ketchum for an evaluation of claimant's need for treatment. In that August 15, 2011 Order, the ALJ asked for an opinion regarding what medical care was necessary. The Order also requested an opinion from the doctor as to whether claimant's work duties for respondent "caused, aggravated or accelerated claimant's need for treatment". The Order issued by the ALJ on November 17, 2011, does not mention the cause of the ongoing need for treatment, merely, that Dr. Ketchum is authorized to decide the course of that treatment and any referrals which he deems necessary. But, the ALJ, in order to allow for medical treatment for an alleged work related condition, must have determined in claimant's favor on the issue of causation.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>2</sup>

The first time to appeal the issues listed in K.S.A. 44-534a(a)(2) would have been after the issuance of the Order on August 15, 2011. Respondent chose not to appeal that Order. The Appeal from the November 17, 2011 Order also addresses the ALJ's referral of claimant for medical treatment. But, inferred from that Order is a finding that the opinion of Dr. Ketchum, contained in his report of September 29, 2011, did not change the ALJ's opinion on the issue of causation. That is an issue over which the Board takes jurisdiction from an appeal of a preliminary order.

Based upon the medical opinion of Dr. Ketchum that claimant's bilateral carpal tunnel syndrome is related to her work for respondent, this Board Member finds that claimant has, again, satisfied her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The Order of the ALJ dated November 17, 2011, is affirmed.

An ALJ is not limited in the number of preliminary hearings that may be held in a case. It is within the sound discretion and authority of the ALJ to determine the number of preliminary hearings to be held and whether a prior preliminary hearing Order should be modified based on the evidence presented. Furthermore, the ALJ has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require.<sup>3</sup>

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant suffered personal injury by accident which arose out of and in the course of her employment with respondent. Therefore, the Order of November 17, 2011, is affirmed. Any appeal from the August 15, 2011 Order is untimely.

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<sup>2</sup> K.S.A. 44-534a(a)(2).

<sup>3</sup> *Briggs v. MCI Worldcom*, No. 1,003,978, 2003 WL 2003 (Kan. WCAB Sept. 19, 2003).

<sup>4</sup> K.S.A. 44-534a.

**DECISION**

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated November 17, 2011, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2012.

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HONORABLE GARY M. KORTE  
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
John A. Bausch, Attorney for Self-Insured Respondent  
Brad E. Avery, Administrative Law Judge